2004

State of Utah v. Joe Sunthiphab Boupha : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20040901-CA**
v.	:	
JOE SUNTHIPHAB BOUPHA,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONDITIONAL PLEA OF GUILTY TO POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(III) (West 2004), IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, THE HONORABLE PARLEY R. BALDWIN PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his condition guilty plea to one count of possession of a controlled substance with intent to distribute, a second degree felony. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Where both occupants of a vehicle initially deny ownership of marijuana and paraphernalia equally accessible to both, does the subsequent suspicious claim of ownership by one destroy probable cause to arrest the other?

Factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed for clear error. *State v. Galvan*, 2001 UT App 329, ¶ 5, 37 P.3d 1197 (quotation marks and citation omitted). However, a trial court's conclusions of law based on these facts are reviewed under a correctness standard. *State*

v. McArthur, 2000 UT App 23, ¶ 12, 996 P.2d 555 (quoting *State v. Brown*, 853 P.2d 851, 854-55 (Utah 1992)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional and statutory provisions are attached at Addendum A:

U.S. Const., amend. IV;
Utah Code Ann. § 58-37-2 (Supp. 2003);
Utah Code Ann. § 58-37-8 (Supp. 2003);
Utah Code Ann. § 58-37a-5 (2002).

STATEMENT OF THE CASE

On July 23, 2003, defendant was charged with possession of a controlled substance (cocaine) with intent to distribute, a second degree felony; possession of drug paraphernalia, a class B misdemeanor; and possession of a controlled substance (marijuana), a class B misdemeanor (R1-2).

After his preliminary hearing, defendant filed a motion to suppress the drugs underlying his felony charge (R44-55). Following an evidentiary hearing, the trial court denied defendant's motion (R83,105-08).

On August 5, 2004, defendant entered into a conditional plea agreement in which he pleaded guilty to the felony charge but retained his right to appeal the trial court's suppression ruling (R94-99). The State dismissed the two misdemeanor counts (R100).[1] Defendant was sentenced to one to fifteen years in prison (R109-10).

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[1]During the change of plea hearing, defendant also pleaded guilty to one count of possession of a controlled substance, methamphetamine, in an unrelated case (R94-97). That conviction is not at issue in this appeal.

Defendant timely appealed (R112-13).

STATEMENT OF FACTS[2]

Early in the morning of July 22, 2003, Trooper Chris Jones of the Utah Highway Patrol initiated a traffic stop on a Nissan Maxima for speeding and a window tint violation (R132:3-4; R134:9-10,21). Defendant was a passenger in the vehicle, which was owned and operated by Adam Neusocksi (R132:4; R134:9-10,18).

As Trooper Jones reached the vehicle, he noticed a strong odor of alcohol (R132:13; R134:11). Suspecting that Neusocksi had been driving under the influence of alcohol, Jones asked Neusocksi to exit the vehicle (R134:13-14). Defendant remained in the front passenger bucket seat (R134:15).

After failing a field sobriety test, Neusocksi was arrested for DUI and placed in the back seat of Trooper Jones's patrol car (R132:4; R134:11,36). Trooper Jones then searched Neusocksi's vehicle (R132:4; R134:18). Inside the unlocked center console located between the front bucket seats, Jones found a marijuana pipe and a prescription bottle containing marijuana (R132:4-5; R134:19,21-22,34-35,74). Both items were sitting on top of whatever else was in the console (R106;R134:22).

When initially asked, both Neusocksi and defendant denied possession or knowledge of the drugs and paraphernalia. They persisted in that denial for at least 30 minutes (R132:6-7,14,19; R134:35).

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[2] The facts are compiled from the preliminary hearing and the evidentiary hearing on defendant's motion to suppress.

However, during their interaction, Trooper Jones noticed that defendant's eyes displayed a reddening of the conjunctiva (R.132:6; R134:26). Jones, a certified drug recognition expert ("DRE"), recognized this condition as an indicator of recent marijuana use and asked to look in defendant's mouth (R134:30,41-42). Jones noticed that defendant's tongue had a greenish tint and that the back of defendant's tongue was blistered (R132:6; R134:30-31). Based on his training, Jones understood that these also were indicators of recent marijuana use (R134:26,53,148-50).

In addition, during their interaction, defendant admitted to Trooper Jones that he had used marijuana within the last four days and that he had used methamphetamine within the last 24 hours (R132:18; R134:25).

Based on the driver's and defendant's denial of any knowledge of the contraband found in Neusocksi's vehicle, on the multiple indicators suggesting that defendant had recently used marijuana, and on defendant's admission to having used marijuana within the last few days, Trooper Jones decided to arrest defendant for possession of drug paraphernalia and marijuana (R132:6-7,22; R134:35). Defendant was handcuffed and placed in the back of a patrol car parked directly next to Trooper Jones's patrol car, in which Neusocksi was sitting (R134:36).

As Trooper Jones completed his search of Neusocksi's vehicle, Jones witnessed defendant and Neusocksi gesturing and mouthing words to each other through the closed patrol car windows (R134:36-37). Trooper Jones could not determine what the two were saying (R134:37). However, when Trooper Jones entered his patrol car to transport

Neusocksi to jail, Neusocksi immediately declared that the drugs and paraphernalia were his (R132:7,20; R134:37,80). Believing that "the driver was trying to cover for the passenger," Trooper Jones did not release defendant from custody after Neusocksi's admission but, rather, had defendant transported to the jail (R132:8-9; R134:38,81).

At the jail, an officer conducted a more thorough search of defendant's person (R132:9). That search revealed that defendant was wearing two pairs of underwear (R132:24-25). Inside the underwear, the officer found four bags of cocaine (R132:10,12, 24-25).

Based on these events, defendant was charged with possession of a controlled substance (cocaine) with intent to distribute, a second degree felony; possession of a controlled substance (marijuana), a class B misdemeanor; and possession of drug paraphernalia, also a class B misdemeanor (R1-2). Before trial, defendant filed a motion to suppress the drug evidence, claiming that Trooper Jones lacked probable cause to arrest him for possession of the contraband found in Neusocksi's vehicle once Neusocksi asserted that the contraband was his (R44-55).

At the evidentiary hearing that followed, Trooper Jones explained why he believed he had probable cause to arrest defendant. First, both defendant and Neusocksi initially denied any knowledge of the drugs. Second, sitting in the front passenger seat of Neusocksi's vehicle, defendant had been in very close proximity to the drugs found in the center console. Third, defendant admitted that, within the last four days, he had used the very drug found in Neusocksi's vehicle. Fourth, defendant had reddening of the

conjunctiva, a greenish tongue, and blisters at the back of his tongue—all indications, Jones had learned in his drug recognition course, of recent marijuana use. (R134:21,79).

Although Trooper Jones's DRE instructor confirmed that his students were taught that a greenish tongue is an indicator of recent marijuana use, an expert witness called by defendant disputed that contention. Defendant's witnesses did agree, however, that both a reddening of the eyes and a blistering of the tongue were possible indicators of such use (R134:26,53,90,93,97,100,103,112,114,123-24).

At the end of the hearing, defendant conceded that Trooper Jones had probable cause "to apprehend both individuals who had access to the marijuana found in the vehicle, especially when neither initially claimed ownership of the drugs" (R134:187). However, defendant argued, "[o]nce the driver of the vehicle stated that the marijuana and the pipe were his, the probable cause over the defendant disappeared" (R134:188, 196).

The trial court rejected defendant's contention. The court concluded:

> 3. Trooper Jones had sufficient probable cause to arrest the Defendant. Pursuant to *Maryland v. Pringle*, [540 U.S. 366 (2003),] the officer was justified in making the arrest given the denial by all parties in the car.
>
> 4. Trooper Jones' probable cause determination does not evaporate the minute Nouansacksy admits to ownership of the pipe and marijuana.
>
> 5. Trooper Jones[] had sufficient facts absent the denial to make a probable cause arrest—admission of use, proximity to the contraband and physical indications of use.

6. A reasonable police office[r] in Trooper Jones' position would have arrested the Defendant.

7. Given the totality of all the facts and circumstances, the officer acted properly in arresting the Defendant.

(R107 (attached at Addendum B); R134:204-07).

SUMMARY OF THE ARGUMENT

Defendant claims that the trial court erred in denying his suppression motion. Defendant admits that Trooper Jones at one point had probable cause to arrest him for possession of the marijuana and drug paraphernalia found in the center console of Neusocksi's vehicle. However, defendant argues that this probable cause dissipated when Neusocksi told Trooper Jones that the contraband was his.

This argument rests on two false assumptions. First, it assumes that only one person can possess contraband at a time. Second, it assumes that, regardless of the suspicious circumstances accompanying a suspect's admission of criminal conduct, that admission nonetheless defeats any probable cause as to any other suspect even if other evidence implicates that second suspect. Because neither of defendant's assumptions are valid, defendant's claim fails.

ARGUMENT

WHERE TWO OCCUPANTS OF A VEHICLE INITIALLY DENY OWNERSHIP OF MARIJUANA AND PARAPHERNALIA EQUALLY ACCESSIBLE TO BOTH, THE SUBSEQUENT SUSPICIOUS CLAIM OF OWNERSHIP BY ONE DOES NOT DESTROY PROBABLE CAUSE TO ARREST THE OTHER

Defendant claims that the trial court erred in concluding that Trooper Chris Jones had probable cause to arrest him for contraband found in the center console of a car in which he was only a passenger. Aplt. Br. at 10-22. Specifically, defendant asserts that, because his "red eyes and [admission] to smoking marijuana in the past . . . did not rise to the level of probable cause," any probable cause to arrest him "dissipated when the driver and owner of the vehicle admitted that the marijuana and paraphernalia were his." Aplt. Br. at 21. Defendant's claim lacks merit.

Under the Fourth Amendment to the United States Constitution, a warrantless arrest is justified only if the arresting officer has "'probable cause . . . to believe that the suspect has committed or is committing an offense.'" *State v. Hechtle*, 2004 UT App 96, ¶ 10, 89 P.3d 185 (quoting *State v. Trane*, 2002 UT 97, ¶ 26, 57 P.3d 1052) (additional citation and internal quotation marks omitted). However, "[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Moreover, "the probable-cause standard is a 'practical, nontechical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent

men, not legal technicians, act.'" *Id.* at 370 (quoting *Gates*, 462 U.S. at 231) (additional citation and internal quotation marks omitted).

Thus, in determining whether probable cause exists, this Court employs "an 'objective standard: whether from the facts known to the officer, and the inferences [that can] fairly . . . be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense' for which he was arrested." *Hechtle*, 2004 UT App 96, ¶ 10 (quoting *Trane*, 2002 UT 97, ¶ 27) (brackets in original; additional citation and internal quotation marks omitted). Recognizing that "[a] showing of probable cause requires much less evidence than does a finding sufficient to convict," *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988), this Court "examine[s] the totality of the circumstances to determine whether 'a prudent person, or one of reasonable caution, [would believe, based upon the] circumstances shown, that the suspect has committed, is committing, or is about to commit, the offense for which he is arrested." *Hechtle*, 2004 UT App 96, ¶ 11 (quoting *State v. Chansamone*, 2003 UT App 107, ¶ 11, 69 P.3d 293) (second set of brackets in original; additional citation and internal quotation marks omitted).

In this case, defendant was arrested for possession of a controlled substance and drug paraphernalia found in the center console of the car in which he was a passenger (R132:4-5; R134:9-10,18). Thus, defendant was arrested for "knowingly and intentionally . . . possess[ing] . . . a controlled substance . . . ," Utah Code Ann. § 58-37-

8(2)(a)(i) (Supp. 2003), and for "possess[ing,] with intent to use, drug paraphernalia . . . ," *id.* § 58-37a-5 (2002).

Pursuant to section 58-37-2(dd) (Supp. 2003), "possession" or "use" includes "joint or individual ownership [or] control . . . of controlled substances":

> For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

Id.

Thus, proof that the defendant was the sole possessor of the controlled substance or paraphernalia is not necessary to establish possession or use of that contraband. *See, e.g., State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795 (holding that statutes are interpreted according to their plain language); *State v. Coonce*, 2001 UT App 355, ¶ 9, 36 P.3d 533 (holding that statutory terms "should be interpreted and applied according to [their] usually accepted meaning") (citations omitted).

Moreover, under this definition, a defendant may be convicted based on constructive possession so long as "'there [was] a sufficient nexus between the accused and the drug [or paraphernalia] to permit an inference that the accused had both the power and intent to exercise dominion and control over the drug [or paraphernalia].'" *State v. Layman*, 1999 UT 79, ¶ 13, 985 P.2d 991 (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah

1985)). "Whether a sufficient nexus . . . exists depends upon the facts and circumstances of each case." *Fox*, 709 P.2d at 319; *see also State v. Salas*, 820 P.2d 1386, 1388 (Utah App. 1991). A non-exhaustive list of relevant factors include "incriminating statements, suspicious or incriminating behavior, sale of drugs, use of drugs, proximity of defendant to location of drugs, drugs in plain view, and drugs on defendant's person." *Salas*, 820 P.2d at 1388; *see also Layman*, 1999 UT 79, ¶ 15.

Finally, when drugs or paraphernalia found in a vehicle are "accessible to all [the vehicle's occupants]," and when, "[u]pon questioning, [all of the occupants] fail[] to offer any information with respect to the ownership of the [contraband]," an officer has probable cause to believe "that any or all [] of the occupants had knowledge of, and exercised dominion and control over the [contraband]." *Pringle*, 540 U.S. at 800-801.

Under *Pringle*, Trooper Jones had probable cause to arrest both defendant and Neusocksi for constructive possession of the marijuana and paraphernalia found in the center console of Neusocksi's vehicle when "[u]pon questioning," both "failed to offer any information with respect to the ownership of the [contraband]." *Id.* Defendant conceded as much below (R134:187).

Thus, the only question on appeal is whether that probable cause dissipated once Neusocksi belatedly claimed that the contraband was his. Under the authority cited above and the facts of this case, it did not.

First, the contraband was located in an area easily accessible to defendant. *See Salas*, 820 P.2d at1388. As the trial court found, "[t]he [marijuana] pipe and bottle of

marijuana were located on top of items found in the center console" (R106). As the court also found, "[t]he center console has a closed, unlocked lid. The console was directly between the driver and passenger seat" (R106). Both these findings—neither of which is seriously challenged on appeal[3]—support the trial court's conclusion that defendant's "proximity to the contraband" was one of the factors supporting "a probable cause arrest" of defendant despite Neusocksi's belated claim of ownership of the marijuana and paraphernalia (R107).

Second, defendant's physical condition, as well as his own admissions, indicated that defendant was a user of the very drug found near him in Neusocksi's vehicle. *See Salas*, 820 P.2d at1388. As the trial court found, "Defendant showed signs of recent marijuana use—specifically reddened conjunctiva and a blistered tongue" (R106). In addition, "Defendant admitted to using marijuana within the past four days, and using methamphetamine within the past 24 hours" (R106). These findings—unchallenged on appeal—support the trial court's conclusion that defendant's "admission of use" and

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[3]Although defendant claims the trial court's finding that the contraband was "located on top of items found in the center console" "is clearly erroneous and . . . inconsistent with the Trooper's testimony," Aplt. Br. at 13, defendant's own description of that testimony—that the Trooper "didn't remember much being in the center console and . . . didn't remember having to dig for it," *id.*—defeats defendant's claim. *See State v. Coonce*, 2001 UT App 355, ¶ 6, 36 P.3d 533 (holding that, to challenge a trial court finding, "the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the [defendant] resists" and then show that such evidence was insufficient to support those findings); *see also State v. Vessey*, 967 P.2d 960, 966 (Utah App. 1998); *State v. Scheel*, 823 P.2d 470, 472 (Utah App. 1991); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)).

"physical indications of use" also supported "a probable cause arrest" of defendant for constructive possession of marijuana and paraphernalia despite Neusocksi's belated claim of ownership of the contraband (R107). *See Salas*, 820 P.2d at1388.[4]

Finally, the trial court's findings show that defendant and Neusocksi did engage in suspicious behavior. *See Salas*, 820 P.2d at1388. Neither defendant nor Neusocksi initially "claimed ownership of the contraband," but, rather, "[e]ach persisted in the denial for approximately a half hour" (R106).[5] Then, after defendant was arrested and "placed in a patrol vehicle parked next to Trooper Jones's car containing [Neusocksi] handcuffed in the backseat," Trooper Jones observed the two of them "communicating with each other by mouthing statements" (R106). Finally, "[a]s soon as Trooper Jones got in the driver's seat of his vehicle to take [Neusocksi] to the jail, [Neusocksi] said the paraphernalia and drugs belong to him" (R106). These findings, which reflect suspicious behavior by both defendant and Neusocksi, further support the conclusion that Trooper

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[4]In reaching that conclusion, the trial court specifically declined to consider any evidence of defendant's greenish tongue (R106 (finding insufficient "scientific proof to consider a greenish tinted tongue to be an indication of recent marijuana use").

[5]Although defendant challenges the trial court's finding that defendant's and Neusocksi's denial persisted for a half hour, *see* Aplt. Br. at 13, he fails to marshal all of the evidence supporting the trial court's finding as required. *See Coonce*, 2001 UT App 355, ¶ 6. Specifically, defendant fails to marshal Trooper Jones's testimony that, during the thirty-minute period at issue, Jones "had contact with [Neusocksi] several times [because] I have to get in and out of my car to get forms and . . . ." (R134:80). Because this testimony indicates that Neusocksi had multiple opportunities to admit ownership of the contraband during the 30 minutes following his arrest, this evidence supports the trial court's finding that Neusocki persisted in denying ownership for those 30 minutes. Thus, defendant's challenge to that finding fails. *See Coonce*, 2001 UT App 355, ¶ 6; *see also Vessey*, 967 P.2d at 966; *Scheel*, 823 P.2d at 472; *Majestic Inv. Co.*, 818 P.2d at 1315.

Jones had probable cause to arrest defendant for constructive possession of the marijuana and paraphernalia despite Neusocksi's belated claim of ownership of the contraband. *See Salas*, 820 P.2d at1388.

All of this evidence, and the inferences that can be drawn therefrom, support Trooper Jones's conclusion that defendant had committed the offenses for which he was arrested. *See Hechtle*, 2004 UT App 96, ¶ 10. Thus, the trial court properly denied defendant's claim that Trooper Jones lacked probable cause to arrest him.

Defendant's citations to *State v. Hechtle*, 2004 UT App 96, 89 P.3d 185, and *United States v. Di Re*, 332 U.S. 581 (1948), do not alter that conclusion.

Hechtle was driving when his car was stopped for speeding. 2004 UT App 96, ¶ 2. The officer effecting the stop noticed multiple air fresheners in Hechtle's car. *Id.* at ¶ 12. The officer then noticed that Hechtle's eyes were dilated, droopy, and red, and "that Hechtle's tongue was 'very green' with 'blisters all over the back of it.'" *Id.* at ¶ 4. Based on these observations, the officer concluded "that Hechtle had been smoking marijuana" and arrested Hechtle for "driving with any measurable controlled substance in the body." *Id.* at ¶¶ 4, 5. Hechtle was subsequently charged with other crimes based on evidence found during a search incident to arrest. *Id.*

On appeal, Hechtle argued that the officer lacked "probable cause to believe [he] was driving with any measurable controlled substance in his body." *Id.* at ¶ 9. This Court agreed. *Id.* at 13. In reaching that conclusion, this Court noted first that the arresting officer was not a drug recognition expert. *Id.* at 13 n.3. This Court noted second that,

although multiple air fresheners and red eyes "can support, when viewed in conjunction with other factors, the existence of a reasonable suspicion of drug use, . . . the State has presented nothing, no scientific studies and no case law or other authority, to support the reliability of the trooper's concern regarding the condition of Hechtle's tongue." *Id.* at ¶ 13. Finally, this Court noted that, "[e]ven if we were persuaded . . . that the condition of Hechtle's eyes and tongue are presumptively suggestive of marijuana use, nothing in the record indicates either how long these conditions are sustained or how long measurable quantities of marijuana remains in the system as required by the statute [defining this crime]." *Id.* at ¶ 16.

In this case, unlike in *Hechtle*, State witnesses testified—and defendant's experts agreed—that red eyes and blistered tongues may be indicative of recent marijuana use. In addition, unlike the officer in *Hechtle*, Trooper Jones was a DRE; thus, Trooper Jones's training allowed him to place more weight than could the officer in *Hechtle* on defendant's red eyes and blistered tongue as signifying recent marijuana use.

More importantly, however, the crime for which Hechtle had been arrested was driving with any measurable controlled substance in the body. Probable cause to arrest Hechtle for that crime required some evidence indicating that Hechtle had a measurable controlled substance in his body at the time he was observed driving his car.

In contrast, defendant was arrested for possession of a controlled substance and paraphernalia, not for having it inside his body. Thus, although evidence that defendant had recently used the controlled substance helped establish probable cause to arrest him,

evidence that defendant actually had a measurable amount of the controlled substance in his body at the time of his arrest was not necessary. Consequently, *Hechtle*'s concern that "nothing in the record indicates either how long these conditions are sustained or how long measurable quantities of marijuana remains in the system," *Hechtle*, 2004 UT App 96, ¶ 16, is inapposite. Such evidence is simply not dispositive in a drug possession case. The lack of such evidence, therefore, does nothing to undermine the conclusion that probable cause existed here to believe that defendant possessed the marijuana and paraphernalia.

Di Re is also distinguishable. In that case, the government received information from an informant that a specific person had counterfeit gasoline ration coupons. *Di Re*, 332 U.S. at 583. Based on that information, the government set up a sting operation to catch the named suspect in the act of distributing counterfeit coupons. *Id.* Di Re was arrested merely because he was with the suspect at the time the sting was executed. *Id.* at 592-94.

On appeal, Di Re asserted that the government lacked probable cause to arrest him. *Id.* at 583-84. The supreme court agreed, holding that, absent any other evidence connecting a person to the crime, "[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." *Id.* at 594.

In this case, the only person singling out a specific person was defendant's friend, Neusocksi, who did so under highly suspicious circumstances (R134:36-37,80).

Moreover, Trooper Jones had other evidence supporting a probable cause belief that defendant possessed the marijuana and paraphernalia in Neusocksi's vehicle (R132:6; R134:26,30-31). Thus, unlike in *Di Re*, Trooper Jones did not rely solely on defendant's presence in Neusocksi's vehicle to support defendant's arrest. Finally, where the statutes proscribing possession of controlled substances and paraphernalia recognize that more than one person can jointly possess that contraband, *see* Utah Code Ann. § 58-37-2(ff), Trooper Jones was not required to ignore other evidence indicating defendant's ownership in the contraband just because Neusocksi told Jones that the contraband was his.

In sum, the totality of the circumstances in this case established probable cause to arrest defendant for possession of the marijuana and drug paraphernalia found in Neusocksi's vehicle. Thus, the trial court properly denied defendant's motion to suppress the cocaine found on defendant after he was arrested.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED 14 November 2005.

MARK L. SHURTLEFF
Utah Attorney General

Karen A. Kluczniк

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 14 November 2005, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to DEE W. SMITH Weber County Public Defenders Association, Inc., 2550 Washington Boulevard, Suite 300, Ogden, Utah 84401, Attorney for Appellant.

Karen A Klucznik

Addenda

Addendum A

Amendment IV. Search and seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

58-37-2. Definitions.

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in his presence, by his authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(d) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(e) (i) "Controlled substance" means a drug or substance included in Schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug or substance included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513, or any controlled substance analog.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(f) (i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection; or

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection.

(ii) Controlled substance analog does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 366, to the extent the conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(E) Any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription.

(F) Dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(g) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, or for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under Title 58, Chapters 37, 37a, 37b, 37c, or 37d.

(h) "Counterfeit substance" means:

(i) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(ii) any substance that is represented to be a controlled substance.

(i) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(j) "Department" means the Department of Commerce.

(k) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system; or

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(l) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(m) "Dispenser" means a pharmacist who dispenses a controlled substance.

(n) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(o) "Distributor" means a person who distributes controlled substances.

(p) "Drug" means:

(i) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;

(ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(iii) articles, other than food, intended to affect the structure or function of man or other animals; and

(iv) articles intended for use as a component of any articles specified in Subsection (1)(p)(i), (ii), or (iii); but does not include devices or their components, parts, or accessories.

(q) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.

(r) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(s) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(t) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(u) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(v) "Marijuana" means all species of the genus cannabis and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant cannabis sativa or any other species of the genus cannabis which are chemically indistinguishable and pharmacologically active are also included.

(w) "Money" means officially issued coin and currency of the United States or any foreign country.

(x) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(x)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(y) "Negotiable instrument" means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(z) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(aa) "Opium poppy" means the plant of the species papaver somniferum L., except the seeds of the plant.

(bb) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(cc) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(dd) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(ee) "Practitioner" means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(ff) "Prescribe" means to issue a prescription orally or in writing.

(gg) "Prescription" means an order issued by a licensed practitioner, in the course of that practitioner's professional practice, for a controlled substance, other drug, or device which it dispenses or administers for use by a patient or an animal. The order may be issued by word of mouth, written document, telephone, facsimile transmission, computer, or other electronic means of communication as defined by rule.

(hh) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(ii) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property.

(jj) "State" means the state of Utah.

(kk) "Ultimate user" means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain

possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii); or

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor

that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

58-37a-5. Unlawful acts.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Addendum B

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IN THE SECOND DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. JOE SUNTHIPHAB BOUPHA, Defendant.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 031903714 SEP 14 2004 JUDGE PARLEY R. BALDWIN

This Court, having considered the motions, testimony and legal arguments, hereby denies the Defendant's Motion to Suppress. The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On July 22, 2003, Trooper Chris Jones of the Utah Highway Patrol ("Trooper Jones") stopped a Nissan Maxima for speeding and excess window tinting. The vehicle was registered to Adam Nouansacksy ("Nouansacksy").

2. The driver of the vehicle, Nouansacksy, displayed signs of alcohol impairment, Trooper Jones had Nouansacksy perform field sobriety tests.

3. Nouansacksy was arrested for Driving Under the Influence of Alcohol.

4. Nouansacksy did not exhibit any physical signs of drug usage.

5. Trooper Jones searched Nouansacksy's vehicle. The search yielded a marijuana pipe and a prescription bottle containing marijuana in the vehicle's center console.

6. The pipe and bottle of marijuana were located on top of items found in the center console.

7. The center console has a closed, unlocked lid. The console was directly between the driver and passenger seat.

8. Trooper Jones questioned both Nouansacksy and the passenger, Defendant, but neither claimed ownership of the contraband. Each persisted in the denial for approximately a half hour.

9. In questioning Defendant, Trooper Jones observed that Defendant showed signs of recent marijuana use–specifically reddened conjunctiva and a blistered tongue.

10. This Court does not find sufficient scientific proof to consider a greenish tinted tongue to be an indication of recent marijuana use.

11. Trooper Jones is a certified Drug Recognition Expert.

12. Also, Defendant admitted to using marijuana within the past four days, and using methamphetamine within the past 24 hours.

13. The Defendant was arrested for Possession of Paraphernalia and Possession of Marijuana.

14. The Defendant was placed in a patrol vehicle parked next to Trooper Jones' car containing Nouansacksy handcuffed in the backseat.

15. While the Defendant and Nouansacksy were parked next to each other, they were communicating with each other by mouthing statements. Trooper Jones was not able to determine what the two were discussing.

16. As soon as Trooper Jones got in the driver's seat of his vehicle to take Nouansacksy to the jail, Nouansacksy said the paraphernalia and drugs belong to him.

17. Trooper Jones did not change his mind about arresting the Defendant.

18. The Defendant was taken to the jail. While there, he was searched and a large quantity of cocaine was found in his underwear.

19. The Defendant never requested to leave the scene while Trooper Jones was conducting his DUI investigation on Nouansacksy.

20. The Defendant was never ordered to remain at the scene during the parallel investigation.

CONCLUSIONS OF LAW

1. The initial stop was justified because Trooper Jones observed traffic violations.

2. The Defendant was not illegally detained.

3. Trooper Jones had sufficient probable cause to arrest the Defendant. Pursuant to Maryland v. Pringle, the officer was justified in making the arrest given the denial by all parties in the car.

4. Trooper Jones' probable cause determination does not evaporate the minute Nouansacksy admits to ownership of the pipe and marijuana.

5. Trooper Jones' had sufficient facts absent the denial to make a probable cause arrest–admission of use, proximity to the contraband and physical indications of use.

6. A reasonable police office in Trooper Jones' position would have arrested the Defendant.

7. Given the totality of all the facts and circumstances, the officer acted properly in arresting the Defendant.

Dated this 11 day of ~~July~~ Sept, 2004.

JUDGE PARLEY R. BALDWIN
Second Judicial District Court

Approved as to form:

Brenda J. Beaton 8/20/04

BRENDA J. BEATON
Deputy Weber County Attorney

JAMES RETALLICK
Attorney for Defendant